Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

MARILYN WOODYEAR,

Petitioner,

vs.

CLARKE INSURANCE INC.; FUNDING CORP.; KEITH A. RODRIGUEZ, Trustee,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Patterson v. Shumate* this Court held that a debtor and plan participant's interest in an ERISA Qualified Pension Plan is not property of the debtor's estate. In this case the lower courts acknowledge that the debtor/participant's interest in the ERISA Qualified Pension Plan is not subject to seizure, but held that the employee's wife's (non-participant spouses's) interest in the same ERISA Qualified Pension Plan was property of her estate and subject to seizure.

The lower courts held that the anti-alienation provisions of ERISA did not prohibit the trustee from seizing the debtor's (non-participant spouse's) interest in an ERISA Qualified Pension Plan even though no QDRO partitioning the plan had been approved by the plan administrator.

The question presented in this appeal is whether *Patterson v. Shumate* is distinguishable from this case and whether it should make any difference if the interest in the ERISA Qualified Pension Plan belongs to the employee or the employee's wife.

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OPINION BELOW

Petitioner, MARILYN WOODYEAR, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported but is found at *Matter of Woodyear*, 162 F.3d 1160 (5th Cir. 1998) (Appendix A).

The opinion denying rehearing and rehearing en banc is not published but can be found at Appendix B.

STATEMENT OF JURISDICTION

Judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 5, 1998. The Court of Appeals denied a timely filed petition for rehearing and petition for rehearing en banc on December 1, 1998.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. §§ 522(b)(2)(A) and (B) provides in part. "Notwithstanding Section 541 of this Title, an individual debtor may exempt from property of the estate . . .

(2)(A) any property that is exempt under federal law, other than subsection (d) of this Section, or state or local

law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for 180 days immediately preceding the date of filing the petition, or for a longer portion of such 180 day period than in any other place.

(B) Any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable non-bankruptcy law."

11 U.S.C. § 541(a)(1) provides "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

29 U.S.C. § 1056(d)(1) provides in part "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

26 U.S.C. § 402(e)(1)(B) provides "If any amount is paid or distributed to an alternate payee who is the spouse or former spouse of the participant by reason of any qualified domestic relations order (within the meaning of Section 414(P)), subsection (c) shall apply to such distribution in the same manner as if such alternate payee were the employee."

26 U.S.C. § 402(c) provides in part: "(c) Rules applicable to rollovers from exempt trusts. –

(1) Exclusion from income. If

(A) any portion of the balance to the credit of an employee in a qualified trust is paid to

the employee in an eligible rollover distribution,

(B) the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and

(C) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includable in gross income for the taxable year in which paid.

STATEMENT OF THE CASE

Marilyn Woodyear filed for relief under chapter 13 of the bankruptcy code on June 6, 1996. At the time of the filing, Marilyn Woodyear was divorced from Mark Woodyear. Prior to the bankruptcy filing Marilyn Woodyear entered into a voluntary partition of community property with Mark Woodyear which provided for the equal division of the ERISA Qualified PPG Retirement accounts, in the name of Mark Woodyear. Marilyn Woodyear's interest in the accounts was still being held by PPG in an ERISA Qualified Plan when the bankruptcy case was filed. At the time of the filing of the bankruptcy, no QDRO had been approved by the state court or by the plan administrator and the retirement accounts had not been liquidated or distributed to Marilyn Woodyear.

The bankruptcy judge found Marilyn Woodyear's interest in the PPG Industries Inc. Employees Savings Plan to be property of the debtor's estate and not subject

to exemption. This ruling was appealed to the district court. After initially remanding the case for further argument concerning the appellant's right to "roll over" the funds into another qualified account, the District Court affirmed the ruling of the Bankruptcy Court. The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling.

In the case of *Patterson v. Shumate*, 112 S. Ct. 2245, 504 U.S. 753 and 119 L. Ed. 2d 519 (1992) this Court held that a debtor's interest in an ERISA Qualified Pension Plan may be excluded from the property of the bankruptcy estate pursuant to 11 U.S.C. § 541(c). The issue in this case is whether the employee's ex-wife's (non-participant spouse's) interest in her former husband's pension plan is excluded from her bankruptcy estate when that interest in the plan had not been liquidated or distributed to the former spouse pursuant to a QDRO. In other words, does the holding in *Patterson v. Shumate*, supra, exempting the debtor's/participant's interest in an ERISA Qualified Pension Plan from the bankruptcy estate, apply to a former spouse's (non-participant's) interest in her former husband's retirement account.

The Fifth Circuit Court of Appeals erred in finding this case distinguishable from *Patterson v. Shumate*, supra. The employee's interest in an ERISA Qualified Plan is excluded from his bankruptcy estate. His ex-wife's interest in the same account should also be excluded from her bankruptcy estate as she is a non-participant spouse and she is governed by ERISA to the same extent as her former husband, the plan participant. Under the statutory scheme of ERISA, Marilyn Woodyear is entitled to submit a QDRO to the plan administrator and roll over her

interest in the retirement plan to an ERISA qualified plan in her name alone – still exempt from her bankruptcy estate. The Court of Appeals erroneously interpreted and applied the relevant statutory provisions of ERISA to hold that when spouses divorce, ERISA's anti-alienation and preemption provisions no longer apply to the ex-wife's (non-participant spouse's) interest in an ERISA qualified plan and that plan interest becomes part of the debtor's bankruptcy estate. This is clear error. ERISA governs the retirement plan, and consequently, the rights of the participant spouse and non-participant spouse alike. No distinction can be made because the parties are divorced or because one party is a non-participant.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THIS COURT'S PREVIOUS OPINION IN *PATTERSON V. SHUMATE* AND IS CONTRARY TO ERISA'S GOAL OF PROTECTING PENSION BENEFITS.

The decision below is in direct conflict with this Court' s decision in *Patterson v. Shumate*, 112 S.Ct. 2245, 504 U.S. 753 and 119 L. Ed. 2d 519 (1992).

The Fifth Circuit Court of Appeals found *Patterson v. Shumate* inapplicable to this case because it concluded that factually *Patterson v. Shumate* dealt with a retirement "pension" account set aside for when the debtor himself reached retirement age as opposed to the savings account at issue in this case which was set aside for the debtor's former husband, not for his retirement account.

The lower court's reason for not following *Patterson v. Shumate* is misplaced. In *Patterson v. Shumate* and in previous opinions, this Court declined to recognize any exception to ERISA's anti-alienation provision. *Patterson v. Shumate*, 112 S. Ct. 2245 at 2250. See also *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990). It makes no difference whatsoever that the account in question was called a retirement savings account by PPG Industries, Inc. When Congress passed ERISA it made all ERISA qualified accounts exempt from seizure. As this Court stated previously "if exceptions to that policy are to be made, it is for Congress to undertake that task." See *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. at 376, 110 S. Ct. 680 at 687 cited in *Patterson v. Shumate*, 112 S. Ct. 2245 at 2250.

The Fifth Circuit incorrectly found *Patterson v. Shumate* distinguishable by inaccurately stating that the decision in *Patterson* did not concern a debtor who possessed an unrestricted right to a cash distribution at the time of filing a bankruptcy petition. In *Patterson v. Shumate* the corporate trustee, Creasy, terminated and liquidated the pension plan and made full distributions to all plan participants, except Shumate. There was no question that Shumate was entitled to distribution of his plan benefits, but the corporate trustee did not distribute the proceeds to him. After Mr. Shumate filed a chapter 7 bankruptcy, his trustee, Mr. Patterson, filed an adversary proceeding against the plan trustee, Creasy, to recover the pension benefits due Mr. Shumate. The Fifth Circuit is incorrect about the facts. The pension plan had been liquidated and all of the employees including Shumate had a right to

immediate distribution of the funds. See *Creasy v. Coleman Furniture Company,* 763 F.2d 656 at 657 (4th Cir. 1985). See also *Shumate v. Patterson,* 943 F.2d 362 at 363 (4th Cir. 1991) and *Patterson v. Shumate,* 112 S. Ct. 2242 at 2245.

The lower courts erred in their reading of the facts of *Patterson v. Shumate.* The lower courts also erred in carving out an exception to ERISA that has not been authorized by congress. This erosion by the courts of the protections afforded pension plans by ERISA should not be allowed.

In *Patterson v. Shumate,* supra, this Court held that the bankruptcy code exempts a much broader category of interests than 11 U.S.C. § 541(c)(2) including IRA's and government and church pensions. This Court also has consistently refused to recognize any exceptions to ERISA's anti-alienation provisions outside of the bankruptcy context. In *Guidry v. Sheet Metal Worker's Pension Fund,* this Court refused to allow a labor union to place a constructive trust on a member's pension benefits in order to recover funds that a union official had embezzled.

Following the *Guidry v. Sheet Metal Worker's Pension Fund,* supra, rationale, this court stated in *Patterson v. Shumate,* supra, "declining to recognize any exceptions to that provision *within* the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds." (Emphasis original, 112 S. Ct. 2242 at 2250). It is undisputed that the PPG

Industries Employees Savings Plan is an ERISA qualified pension plan and that Marilyn Woodyear is the ex-spouse (non-participant) of the employee and plan participant, Mark Woodyear. She is entitled to her interest in the plan pursuant to Louisiana Community Property Law, but her entitlement to receive the benefits is subject to the plan's requirements and conditions and compliance with ERISA.

It is important to note that at no time, prior to, during, or after the bankruptcy proceedings were instituted, was a QDRO ever submitted to the plan administrator for approval to effect a distribution of Mrs. Woodyear's vested benefits. Pursuant to ERISA and the REA, no distribution can take place unless an approved QDRO directing a distribution be made is submitted to the plan administrator.

Last, but not least, Mrs. Woodyear had the absolute right to "roll over" her portion of the PPG Industries Employees Savings Plan into an ERISA Qualified Retirement Plan in her name in accordance with 26 U.S.C. §§ 402(c) and 402(e)(1)(B) or into an IRA which has no ERISA anti-alienation provision, but is nonetheless exempt from the bankruptcy estate.

The Fifth Circuit seems to conclude that Mrs. Woodyear was in possession of the proceeds of the savings plan. The Fifth Circuit cited *In re Caslavka*, 179 B.R. 141 (Bankr. N.D. Iowa 1995); and *In re Reid*, 139 B.R. 19 (Bankr. S.D. Cal. 1992) for the proposition that if a debtor gains unrestricted access to funds in an ERISA Qualified Plan within the time that the debtor's bankruptcy is forced, such funds are no longer subject to the anti-

restriction clause of ERISA and are thus not excludable from the estate. (Opinion Fifth Circuit, p.3.).

This is not the case here, and the Fifth Circuit is incorrect in this "assumption." If Mrs. Woodyear had obtained the funds and not "rolled over" the proceeds into a qualified pension plan within 60 days, these funds would be subject to the bankruptcy estate. To do so would require that a QDRO be approved and filed with the plan administrator and that Mrs. Woodyear actually take possession of the plan proceeds. This was not done. No QDRO was ever approved or filed with the plan administrator. The plan proceeds remained in the name of debtor's ex-husband and under the control of the plan. No funds were disbursed and clearly, Mrs. Woodyear had no "unrestricted access" to these funds.

The PPG Industries Employees Savings Plan is an ERISA qualified plan. 11 U.S.C. § 541(c)(2) exempts this pension from the bankruptcy estate. To hold otherwise renders the holdings of *Patterson v. Shumate,* supra and *Guidry,* supra, meaningless. The judgment of the Fifth Circuit Court of Appeals should be reversed, and vacated, and this matter be remanded, without argument, with instructions to enter judgment in favor of Mrs. Woodyear and holding that her portion of the pension plan be declared exempt from seizure.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OPINIONS OF OTHER CIRCUITS

The Fifth Circuit indicated in its opinion that the most important fact in making its decision was that this

Court's holding in *Patterson v. Shumate* did not concern a debtor who possessed an unrestricted right to a cash distribution at the time of filing a bankruptcy petition, as did Mrs. Woodyear.

The Fifth Circuit's opinion in this case conflicts with the Ninth Circuit concerning whether or not access to funds in an ERISA qualified plan causes the funds to be property of the debtor's estate. See *In re Conner*, 73 F.3d 258 (9th Cir. 1996), and the Eighth Circuit's ruling in *Whetzal v. Alderson*, 32 F.3d 1302 (8th Cir. 1994) which held that access or control to civil service retirement funds does not cause the funds to be the property of the debtor's estate.

In addition, prior to the decision of this Court in *Patterson v. Shumate*, the Fifth Circuit held that the debtor's access to funds in an ERISA Plan caused the funds to be property of the bankruptcy estate. See *In re: Goff*, 706 F.2d 574 at 587 (5th Cir. 1983). The *Goff* case was specifically overruled by this Court in *Patterson v. Shumate*, 112 S. Ct. 2245 at 2248.

The Fifth Circuit erred in continuing to hold that the debtor's unrestricted right of access to her ERISA Plan subjects those plan proceeds to the bankruptcy estate regardless of this Court's ruling in *Patterson*, supra. This Court should grant writs in this case to resolve the split in the circuits over whether the right of access or control to the funds in an ERISA Qualified Plan causes the funds to become property of the debtor's bankruptcy estate.

The Fifth Circuit's opinion in this case should be reversed and this court should find that unrestricted access to funds in an ERISA Qualified Plan is irrelevant to

determination whether the funds became a part of the debtor's estate. The correct analysis is whether the pension proceeds are within an ERISA qualified plan. If the funds are in an ERISA qualified plan then the analysis ends there and the funds are not part of the bankruptcy estate. *In re Conner*, 73 F.3d 258 at 260 (9th Cir. 1996).

The PPG Industries Employees Savings Plan involved in this case is an ERISA qualified plan, which contained an anti-alienation provision. The funds have not been distributed to Marilyn Woodyear. As a result the pension funds should have been excluded from her estate.

CONCLUSION

This case presents a question of exceptional importance to non-employees and former spouses who own an interest in their spouse's or former spouse's ERISA Qualified Plans. Congress specifically placed a provision within the ERISA statute making both the employee's interest and the employee's spouse's (non-participant's) interest in ERISA Qualified Accounts exempt from seizure. ERISA applies equally to participants and non-participants, to spouses and former spouses. ERISA regulates access to the qualified pension plan itself.

If not reversed by this court, the Fifth Circuit's opinion means that in every case of a divorce, the non-participant spouse's interest in the ERISA qualified plan is subject to seizure by her creditors. This is a new exception to the ERISA anti-alienation clause created by the Fifth Circuit that was not authorized by Congress or recognized by this court. This "distinction" also treats

spouses and former spouses who have an interest in an ERISA qualified plan differently from the employee spouse and plan participant. ERISA does not permit this, nor should this Court allow it to happen by not granting this writ of certiorari.

The issue in this case is whether the plain language of the statute should be ignored so that creditors can seize the employee's spouse's interest in an ERISA Qualified Account. The obvious answer to this question is no. Accordingly the Petition for Writ of Certiorari should be granted and the lower court opinion should be reversed and vacated. Since the opinion of the Fifth Circuit Court of Appeals was non-published, and therefore, of limited precedential value, oral argument is not necessary.

Appellant recognizes that due to the extreme volume of writ applications, this Court cannot grant writs and give oral argument to cases of limited precedential value. However, this case affects Mrs. Woodyear's future pension rights and security, as well as potentially thousands of similarly situated spouses and former spouses who are non-participants but owners of an interest in their employee spouse's or former spouse's ERISA qualified pension plans. Action on this writ is needed, and it should be granted, without oral argument, and judgment rendered granting the relief prayed for in this application.

This Court should remand this matter to the Fifth Circuit Court of Appeals with instructions to find petitioner's interest in the ERISA qualified plan is excluded

from her bankruptcy estate and render a judgment to that effect.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-31242

In The Matter Of: MARILYN WOODYEAR,

Debtor.

MARILYN WOODYEAR,

Appellant,

versus

CLARKE INSURANCE INC.; FUNDING CORP.; KEITH A. RODRIGUEZ, Trustee,

Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 97-CV-62

(Filed Nov. 5, 1998)

Before REYNALDO GARZA, STEWART and PARKER, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Marilyn Woodyear appeals the district court's holding that (1) her interest in her ex-husband's PPG Industries Employee Savings Plan ("Savings Plan") is includable as property of the bankruptcy estate and (2) her interest in the Savings Plan is not exempt from seizure by the bankruptcy trustee under Louisiana law.

The standard of appellate review is set forth in Bankruptcy Rule 8013, which provides that on appeal, "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed.R.Bankr.P. 8013. Further, "[w]hen the district court has affirmed the bankruptcy court's findings the review for clear error is strict." *Traina v. Whitney Nat. Bank*, 109 F.3d 244, 246 (5th Cir. 1997) (citing *In re Kemp*, 52 F.3d 546, 550 (5th Cir. 1995)). The bankruptcy court's conclusions of law, however, are subject to plenary review on appeal. *Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993) (citing *Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1464 (5th Cir. 1991)).

Woodyear argues that her interest in the Savings Plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). She further contends that in *Patterson v. Shumate*, 504 U.S. 753, 765, 112 S.Ct. 2242, 2250, 119 L.Ed.2d 519 (1992), the Supreme Court held that a debtor's interest in an ERISA-qualified pension plan is not property of the bankruptcy estate that can be reached by the trustee. The bankruptcy judge in the instant case, however, determined that because Woodyear was entitled to receive an immediate distribution of her interest in the Savings Plan, the funds were no longer subject to ERISA

restrictions and thus were property of the debtor's estate. This determination was affirmed by the district court.

Bankruptcy Code Article 541 defines property of the bankruptcy estate to include funds that a debtor becomes entitled to as a result of a divorce either before bankruptcy filing or before 180 days expired following the bankruptcy filing. 11 U.S.C. § 541(a)(5)(B).[1] Article 541 does not include as property of the bankruptcy estate funds containing a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." 11 U.S.C. § 541(c)(2). Woodyear claims that the Internal Revenue Service has characterized her ex-husband's savings plan as "qualified" under ERISA and that her interest must therefore be ERISA-covered as well. In interpreting the circumstances in which a retirement account is subject to a restriction within the meaning of § 541(c)(2), bankruptcy courts have ruled that if a debtor gains unrestricted access to funds in an ERISA-qualified plan within the time that the debtor's bankruptcy estate is forced, such funds are no longer subject to the anti-restriction clause of ERISA and are thus not excludable from the estate. *In re Caslavka*, 179 B.R. 141, 143 (Bankr. N.D. Iowa 1995); *see also In re Reid*, 139 B.R. 19, 21 (Bankr. S.D. Cal 1992). Under this analysis, it is clear that Woodyear's interest is not excludable from the estate. In order for Woodyear's interest in the Savings Plan to be recognized, she must present a Qualified Domestic Relations Order

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[1] The Woodyears' divorce judgment was rendered on February 8, 1995. Marilyn Woodyear filed a petition for relief under Chapter 13 of the Bankruptcy Code on June 7, 1996.

("QDRO") to PPG Industries. This will entitle her to an immediate distribution of approximately $75,000 which will no longer exist in a trust or plan. As ERISA no longer applies to these funds, they are not subject to the anti-restriction clause and therefore must be included as property of the estate.

We find the Supreme Court's holding in *Patterson* inapplicable to the instant facts and circumstances. As the district court noted, *Patterson* dealt with a retirement "pension" account set aside for when the debtor himself reached retirement age, as opposed to the savings account at issue in this case, which was set aside for the debtor's former husband, not for his retirement account. *Patterson*, 504 U.S. at 764-65, 112 S.Ct. at 2250. Perhaps most important to our examination is that the decision in *Patterson* does not concern a debtor who possesses an unrestricted right to a cash distribution at the time of filing a bankruptcy petition as does Woodyear. We conclude that the district court did not clearly err in affirming the determination of the bankruptcy court.

Second, Woodyear urges that even if her interest in the Savings Plan is considered property of the bankruptcy estate, she is still entitled to claim the funds as exempt under Louisiana law. Under Louisiana law, a person may exempt from a bankruptcy estate those contributions to retirement accounts which are (1) placed into (or "contributed" to) a financial plan itself exempt from federal income tax, and (2) placed into such a financial plan no less than one year before the person files a bankruptcy petition. LSA-R.S. 20:33(1). In turn, the Internal Revenue Code offers tax-shelter treatment for an "employee's" funds which are "rolled over" from an

ERISA-qualified employee benefit plan into an individual retirement account, so long as the funds are qualified in the retirement account within sixty days of receipt. 26 U.S.C. § 402(c).[1] Arguing before the district court, Woodyear claimed that at some undetermined time in the future she could obtain a QDRO and "roll over" her interest in her ex-husband's ERISA-qualified Savings Plan into her own retirement account pursuant to 26 U.S.C. § 402(c). Woodyear argued that she therefore was entitled to a present exemption as to those funds in the Savings Plan. The bankruptcy court and the district court, in turn, rejected the debtor's interpretation of the interplay between 26 U.S.C. § 402(c) and LSA-R.S. 20:33 because any attempted rollover under 26 U.S.C. § 402(c) into a retirement account would necessarily be a "contribution" to the retirement account which would not take place at least a year before the debtor filed her bankruptcy petition.

On appeal, Woodyear argues only that the contributions to the Savings Plan meet the requirements of LSA-R.S. 20:33 and that the exemption therefore applies. She again reminds us that Louisiana law makes all individual retirement accounts and all other tax-qualified retirement plans exempt property in a bankruptcy case unless the

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[1] For the purposes of the debtor's argument, both the bankruptcy court and the district court assumed without ruling that 26 U.S.C. § 402(c) actually applies to the debtor, despite the fact that she, herself, is not the "employee" to which the Internal Revenue Code appears to refer. The district court noted, and we reiterate, that the debtor has not proffered any evidence to the effect that 26 U.S.C. § 402(c) may be utilized by the ex-spouse of an employee.

contributions were made less than one year before the filing of bankruptcy. In order for the Louisiana exemption to apply, Woodyear's interest in the Savings Plan must be tax-exempt. As the bankruptcy court originally determined and we discussed above, once the QDRO is issued, Woodyear's interest in the Savings Plan will no longer exist in a pension plan, account, or trust. Therefore, Woodyear's interest in the Savings Plan is not exempt under LSA-R.S. 20:33. We conclude that the determinations of the bankruptcy court and the district court to this effect are sound.

For the foregoing reasons, we hereby AFFIRM the decision of the district court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-31242

In The Matter Of: MARILYN WOODYEAR

Debtor

MARILYN WOODYEAR

Appellant

v.

CLARKE INSURANCE INC; FUNDING CORP; KEITH A RODRIGUEZ, Trustee

Appellees

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed Dec. 1, 1998)

(Opinion 11/5/98, 5 Cir., ___, ___ F.3d ___)

Before REYNALDO G. GARZA, STEWART and PARKER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MARILYN WOODYEAR	:	CIVIL ACTION NO.
VERSUS	:	CV97-0062
CLARKE INSURANCE INC., ET AL.	:	JUDGE TRIMBLE
	:	MAGISTRATE JUDGE WILSON

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

IN RE:	:	CASE NO. 96BK-20468-LC13
MARILYN WOODYEAR	:	JUDGE GERALD H. SCHIFF

OPINION

(Filed Nov. 4, 1997)

In the case at bar, the debtor appeals from the Bankruptcy Court's decisions (1) to include in the debtor's bankruptcy estate the debtor's share of her former husband's employment savings plan, and (2) to deny the debtor the opportunity to claim an exemption under Louisiana state law with regard to her share of the employment savings plan. After due consideration of the parties' arguments and the applicable law, the Court AFFIRMS the two decisions of the Bankruptcy Court with regard to

the appellant's share of her former husband's employment savings plan.

I. History

The debtor's divorce was rendered on February 8, 1995. However, due to a disagreement over the proportion that the debtor was entitled to out of her former husband's retirement plan and savings plan, it was not until June 5, 1996, that the debtor received a state court order entitling her to collect a one-half present value of both the savings plan and retirement plan. Soon thereafter, on June 7, 1996, the debtor filed for bankruptcy in the Western District of Louisiana. At the time of filing for bankruptcy, throughout her bankruptcy court proceedings, and apparently up until the present time, the debtor has declined to present to her former husband's employer a Qualified Domestic Relations Order ("QDRO"), which would have entitled her to an immediate cash distribution of around $75,000 from the former husband's savings plan.[1] Instead, the debtor listed her one-half share in the former husband's savings plan as property exempt from her bankruptcy estate. Moreover, despite her unencumbered access to the $75,000 in savings, the debtor continues to utilize pro bono legal services.

The first time that the debtor's case appeared before the Bankruptcy Court, the Bankruptcy Court ruled that

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[1] The Bankruptcy Court's ruling with regard to the Character of the debtor's share of her former husband's retirement plan (as opposed to the savings plan) is not on appeal to the Court.

the debtor's interest in her former husband's ERISA-qualified savings plan was not exempt property under the Bankruptcy Code and, therefore, was property of the debtor's bankruptcy estate. The debtor appealed the Bankruptcy Court's ruling to this Court, alleging, in addition to those arguments raised before the Bankruptcy Judge, a new argument as to why the savings plan was exempt form the bankruptcy estate – the allegation that the debtor was entitled to "roll over" the savings plan into a second, exempt source. Because the Bankruptcy Court had not had the opportunity to consider the issue of "rollover" status, this Court remanded the debtor's status to the Bankruptcy Court.

When the Bankruptcy Court ruled for a second time on the debtor's action, it again held that the petitioner's savings plan was not exempt form the bankruptcy estate under the Bankruptcy Code. Further, the Bankruptcy Court held that the petitioner was not entitled to exercise a "roll over" so as to exempt her savings plan from her estate. The debtor now appeals to this court form these decisions of the Bankruptcy Court.

II. Applicable Law

Because this action concerns an appeal from a final order of the Bankruptcy Court in a matter determined to be a core proceeding under 28 U.S.C. 157(b)(3), this Court exercises its appellate jurisdiction pursuant to 28 U.S.C. 158(a)(1). Therefore, in accordance with Bankruptcy Rule 8013, all fact findings of the Bankruptcy Court are to be accorded due weight and shall not be set aside unless the

Court determines those fact findings to be clearly erroneous. In other words, this Court's "review of a bankruptcy court's decision is governed by the same standards of review employed by the Fifth Circuit when reviewing a district court's judgment. A bankruptcy court's conclusions of law are subject to plenary review on appeal and the findings of fact are adopted unless clearly erroneous." *Cottonport Bank v. Dichiara*, 193 B.R. 798, 800 (W.D. La. 1996).

A. "Rollover" under the Internal Revenue Code and Louisiana Law

Under Louisiana's law, a person may exempt from the bankruptcy estate those contributions to retirement accounts which are (1) placed into (or "contributed" to) a financial plan itself exempt from federal income tax, and (2) placed into such a financial plan no less than one year before the person files a bankruptcy petition. L.S.A. R.S. 20:33(a). In turn, the Internal Revenue Code exempts an "employee's" funds which are "rolled over" from an ERISA qualified "employee" benefit plan into an individual retirement account, so long as the funds are qualified in the retirement account within sixty days of receipt. 26 U.S.C. 402(c).[2]

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[2] For the purposes of the debtor's argument, the Bankruptcy Judge assumed without ruling that 26 U.S.C. 402© actually applies to the debtor, despite the fact that she, herself, is not the "employee" to which the Internal Revenue Code appears to refer. For the same purposes, this Court will assume the same with regard to the meaning of "employee." However, the Court notes that the debtor has yet to proffer any evidence

In this case, the debtor claimed for the first time in her initial appeal to this Court that she is entitled to exemption from seizure under L.S.A. R.S. 20:33 because 28 U.S.C. 402 applies to her interest in her former husband's savings account. In support, the debtor argues that at some undetermined time in the ***future*** she could obtain a QDRO and then "roll over" her interest in her former husband's ERISA qualified ***savings*** account into her own ***retirement*** account pursuant to 28 U.S.C. 402(c); therefore, the debtor argues, she is entitled to a ***present*** exemption as to those funds in the ***savings*** account.

In a conclusion of law, the Bankruptcy Court rejected the debtor's interpretations of the interplay between 28 U.S.C. 402(c) and L.S.A. R.S. 20:33 because any attempted rollover under 28 U.S.C. 402(c) into a retirement account would necessarily be a "contribution" to the retirement account, which contribution would not take place at least a year before the debtor filed her bankruptcy petition. After conducting a plenary review of the Bankruptcy Court's application of 28 U.S.C. 402(c) and L.S.A. R.S. 20:33 to the circumstances of this case, this Court agrees with the Bankruptcy Court's conclusion. The Court therefore affirms the Bankruptcy Court's determination that the debtor is not entitled to exempt her interest in her former husband's savings account under 28 U.S.C. 402(c) and L.S.A. R.S. 20:33.

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to the effect that 26 U.S.C. § 402© may be utilized by the ***ex-spouse*** of an "employee," which the debtor is.

B. Savings Plan in Bankruptcy Estate

Bankruptcy Code Article 541 defines property of the Bankruptcy estate to include funds that a debtor becomes entitled to as a result of a divorce either before a bankruptcy filing or before 180 days expire following the bankruptcy filing. 11 U.S.C. 541(a)(5)(b). Article 541 does not include as property of the bankruptcy estate funds containing a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under ***applicable nonbankruptcy law.***" 11 U.S.C. 541(c)(2) (emphasis added). In *Patterson v. Shumate,* 112 S.Ct. 2242 (1992), the Supreme Court of the United States held that a pension account that met the qualifications of the "transfer restriction" of the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. 1001 et seq., was exactly the sort of "restriction . . . under applicable nonbankruptcy law" that exempted an account from the property of the bankruptcy estate.

However, in interpreting exactly when a retirement account is subject to a "restriction" or spendthrift clause, courts have ruled that if a debtor gains unrestricted access to funds in an ERISA-qualified plan within the time that the debtor's bankruptcy estate is formed, such funds are no longer subject to the anti-restriction clause of ERISA and thus are not excludable from the estate." *In re Caslavka,* 179 B.R. 141, 143 (Bankr. N.D. Iowa 1995); see also *In re Reid,* 139 B.R. 19, 21 (Bankr. S.D. Cal. 1992) (debtor had unrestricted access to ERISA plan funds through a pre-bankruptcy petition termination of his employment).

In the case at bar, the debtor claims that the Internal Revenue Service has characterized her ex-husband's savings plan as "qualified" under ERISA and that such characterization required the Bankruptcy Judge to Exempt the debtor's interest in the savings plan. Nonetheless, the Court first notes that the debtor nowhere indicates that her former husband's savings plan itself actually contains a spendthrift provision; nor does any indication of such a spendthrift provision appear in the entirety of the trial record. Secondly, the Court notes that the decision in *Patterson* dealt with a ***retirement*** "pension" account set aside for when the ***debtor himself*** reached retirement age, as opposed to the ***savings*** account at issue in this case, which was set aside for the ***debtor's former husband***, not his retirement account. *Patterson v. Shumate*, 112 S.Ct. at 2250. Thirdly, the Court notes that the decision in *Patterson*, unlike the case at bar, does not concern a debtor possessed of an unrestricted right to a cash distribution at the time of filing a bankruptcy petition. *Id.*

None of these factors necessarily contradicts the alleged determination of the I.R.S. with regard to the former husband's savings account. However, taken together, all three factors support the Bankruptcy Judge's factual conclusion that, under the circumstances of this case, the debtor's individual interest in her former husband's account was not analogous to the pension plan at issue in *Patterson* and, therefore, the debtor's interest was no longer entitled to ERISA protection. Furthermore, the Bankruptcy court's determination that the debtor was not entitled to "roll over" her interest under state law is yet another factor supporting the Bankruptcy Court's final

decision that the debtor's share of the savings plan was no longer exempted by ERISA.

In light of the facts before the Bankruptcy Court at the time of its decision, the Court cannot say that the Bankruptcy Court's ultimate determination is clearly erroneous. The decision of the Bankruptcy Court to include the debtor's savings plan in her bankruptcy estate is therefore AFFIRMED.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

IN RE:

MARILYN WOODYEAR — **CASE NO. 96-20468**

Debtor — **Chapter 13**

REASONS FOR DECISION

(Filed Jul. 24, 1997)

Marilyn Woodyear ("Debtor") filed a petition for relief under chapter 13 of the Bankruptcy Code on June 7, 1996. Objections to the Debtor's claim of exemptions with regard to her interest in both the PPG Industries Employee Savings Plan ("Savings Plan") and the PPG Industries Retirement Income Plan ("Retirement Plan") were filed by both Keith A. Rodriguez, the standing chapter 13 trustee, and Clarke Insurance Inc., a creditor in the case.

After a hearing on the objections, this court entered an order overruling the objections as to the Retirement Plan[1], but sustaining the objections and thereby disallowing the claim of exemption with regard to the Savings Plan. The Debtor appealed the ruling with respect to the

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[1] The decision was not made on the basis of exemption, but that the Debtor's interest in the Retirement Plan was not property of the estate. *See*, 11 U.S.C. § 541(c)(2), and *Patterson v. Shumate*, 504 U.S. 753 (1992).

Savings Plan. The United States district Court for the Western District of Louisiana remanded the case to this court for further consideration of an argument raised by the Debtor for the first time on appeal.

This court's original decision was based upon a finding that the Debtor's interest in the Savings Plan was property of the estate and, further, that the Savings Plan was not exempt under applicable Louisiana law or other nonbankruptcy law.

The Debtor and her former spouse were engaged in litigation over the partition of their community estate. Such litigation had progressed to the point that only presentment of certain paperwork was necessary for the Debtor to be entitled to receive her interest in the Savings Plan and Retirement Plan. The Debtor filed this Chapter 13 proceeding prior to such documentation being completed. This court held that once the Debtor produced a qualified domestic relations order ("QDRO"), the funds in the Savings Plan would be released to her. Thus, the court reasoned that the funds would no longer exist in an ERISA-qualified plan and were therefore property of the estate. The court then concluded that the funds were not exempt as they would no longer exist in an ERISA-qualified plan.

On appeal, for the first time, and now before this court, the debtor argues that pursuant to 26 U.S.C. §402(c) ("§ 402(c)"), upon receipt of the funds in the Savings Plan, she may "roll-over" the funds into another qualified plan and avoid paying taxes on the distribution. This may well be the case. However, this event would not affect this court's determination that her interest in the

Savings Plan is property of the estate. In the original decision, this court stated:

> The commencement of a bankruptcy case creates an "estate", which estate generally consists of all "legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(a)(1) of the Code. Section 541(c)(2) of the Code, however, provides that restrictions on the transfer of the debtor's beneficial interest in a trust which is enforceable under applicable nonbankruptcy law is enforceable in bankruptcy cases. The Supreme Court has held that this provision covers pension plans qualified under the Employee Retirement Income Security Act ("ERISA"), which was determined to be "applicable nonbankruptcy law." *Patterson v. Shumate*, 504 U.S. 753 (1992). Consequently, if the Debtor's interest in either plan is protected by ERISA, the protected plan is not property of the estate.

The clear meaning of the statute reveals that interests in trusts are not property of the estate solely because of the restriction on transferability, *i.e.*, the existence of the anti-alienation provisions, of the trust, and not as a result of freedom from taxation.

The Debtor's position that § 402(c) provides protection of the Debtor's interest in the Savings Plan can only possibly have an effect on the court's determination that the Debtor's interest in the Savings Plan is exempt, and not on whether the property constitutes property of the estate.

LSA-R.S. 20:33 ("R. S. 20:33(a)") is the relevant Louisiana statute providing for exemptions of pensions and related plans:

> The following shall be exempt from all liability for any debt except alimony and child support:
>
> > (1) All pensions, all proceeds of and payments under annuity polices or plans, all individual retirement accounts, all Keogh plans, all simplified employee pension plans, and all other plans qualified under Sections 401 or 408 of the Internal Revenue Code. ***However, an individual retirement account, Keogh plan, simplified employee pension plan, or other qualified plan is only exempt to the extent that contributions thereto were exempt from federal income taxation at the time of contribution,*** plus interest or dividends that have accrued thereon. No contribution shall be exempt if made less that [sic] one calendar year from the date of filing for bankruptcy, whether voluntary or involuntarily, or less than one calendar year from the date writs of seizure are filed against such account or plan. (Emphasis added).

Section 402(c) of the Internal Revenue Code allows an employee to avoid taxation on a distribution from a qualified trust if the distribution is transferred into an eligible retirement plan within 60 days. Although the court has some doubts as to whether the Debtor could avail herself of the benefits of § 402(c), as she is not an "employee" within the meaning of the Savings Plan, the court will assume for the purpose of argument that § 402(c) would apply in this case. The italicized portion of R.S. 20:33(a)

above, together with § 402(c), leads the court to conclude that if the Debtor were to actually place the funds received from the Savings Plan into an eligible retirement plan, the new plan would be exempt as the contributions are exempt from federal income taxation pursuant to § 402(c). The last sentence of R.S. 20:33(a), however, requires a finding that the new plan would not be exempt as the contribution would not have been made within one year prior to the date of the filing of the bankruptcy petition, but actually after the filing of the bankruptcy petition.

Counsel for the Debtor argues that the contributions discussed in R.S. 20:33(a) refer to the contributions made by the employee during the Savings Plan. The court disagrees. The contribution which would be exempt pursuant to § 402(c), and which would allow the Debtor to assert an exemption under R. S. 20:33(a), would be the rollover of funds, not the employee contributions made by the Debtor's spouse.

Therefore, the court finds that the Debtor's interest in the Savings Plan is not exempt, even if she were to place any funds in another qualified trust. For that reason, the court affirms its prior ruling sustaining the objections to claimed exemptions.

A separate order in conformity with the foregoing reasons has this day been entered into the record of these proceedings.

THUS DONE AND SIGNED in Chambers, at Opelousas, Louisiana, on July 24, 1997.

/s/ Gerald H. Schiff
Gerald H. Schiff
United States Bankruptcy Judge

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

MARILYN WOODYEAR	:	DOCKET NO. 97-0062
VS.	:	
	:	JUDGE JAMES T.
CLARK INSURANCE, INC., ET AL.	:	TRIMBLE, JR.
	:	
	:	MAGISTRATE JUDGE
	:	WILSON

ORDER

(Filed Apr. 24, 1997)

Presently before the court is an appeal from the United States Bankruptcy Court in the above-captioned case, seeking review of Judge Gerald H. Schiff's conclusion that the interest of appellant, Marilyn Woodyear, in the PPG Industries Employee Savings Plan ("Savings Plan") is not exempt from seizure under La. R.S. § 20.33. This court has jurisdiction pursuant to 28 U.S.C. § 156.

The Savings Plan funds must meet two conditions to qualify for exemption from seizure under La.R.S. § 20.33: (1) the "contributions" must have been exempt from federal income taxation at the time of contribution, and (2) the contribution could not have been made within one year of filing for bankruptcy. *Dengel v. Gaffney*, No. 90-33, 1990 WL 124326, at *2 (E.D.La. Aug. 6, 1990); *Allison v. F.D.I.C.*, 817 F.Supp. 630, 632-33 (M.D.La. 1993). The

Bankruptcy Judge determined that the funds from appellant's Savings Plan, which are subject to immediate distribution upon issuance of a qualified domestic relations order, are not exempt from federal income tax, and, therefore, are subject to seizure in satisfaction of appellant's obligations.

Appellant argues, for the first time on appeal, that she is entitled to "roll over" the subject funds into another eligible plan without incurring federal income tax under 26 U.S.C. § 402. The Bankruptcy Court has not had an opportunity to consider this argument. Accordingly, in fairness to the parties and to that court, it is hereby ORDERED that this case be and is REMANDED to the Bankruptcy Court for further consideration in light of appellant's argument.

THUS DONE AND SIGNED in chambers at Lake Charles, Louisiana this 24th day of April, 1997.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

IN RE:

MARILYN WOODYEAR, **CASE NO. 96-20468-13**

Debtor

REASONS FOR DECISION

(Filed Nov. 19, 1996)

On June 7, 1996, Marilyn Woodyear ("Debtor") filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code ("Code"). Schedule B filed by the Debtor included an interest in a 401K plan as an asset; the Debtor also claimed such asset as exempt in Schedule C pursuant to the provisions of LSA-R.S. 20:33.

Keith A. Rodriguez ("Trustee"), the standing chapter 13 trustee and Clarke Insurance, Inc. ("Clarke"), filed timely objections to the claimed exemption. A hearing on the exemption was held on October 17, 1996. The Trustee and the Debtor each filed memorandum in support of their respective positions. Counsel for Clarke submitted a letter adopting the Trustee's position. The matter was thereafter taken under advisement.

The court has jurisdiction over this proceeding pursuant to the provisions of 28 U.S.C. § 1334. The case has been referred to this court by the Standing Order of Reference entered in this district which is set forth as

Rule 22.01 of the Local Rules of the United States District Court for the Western District of Louisiana. No party in interest has requested a withdrawal of the reference. The court finds that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

These Reasons for Decision constitute the Court's findings of fact and conclusions of law pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure.

I. FACTS

The Debtor and Mark Woodyear were married to each other on March 28, 1981. They were divorced on February 8, 1995. By operation of Louisiana law, the community of acquets and gains previously existing between them was terminated as of February 24, 1994, the date the petition for divorce was filed.

Mr. Woodyear was employed by PPG Industries, Inc. ("PPG"), during the marriage. In the community property settlement agreement executed by the parties, Ms. Woodyear received one-half of any and all retirement and/or pension plans in Mr. Woodyear's name as a result of his employment at PPG during the marriage.

Mr. Woodyear was a participant in two plans at PPG, namely the PPG Industries Employee Savings Plan ("Savings Plan") and the PPG Industries Retirement Income Plan ("Retirement Plan").

II. LAW AND ANALYSIS

(a) Property of the Estate.

Although this issue arose on objections to an exemption claimed by the Debtor, the court must first determine whether the Debtor's interest in the Savings Plan and/or the Retirement Plan is property of the estate.

The commencement of a bankruptcy case creates an "estate", which estate generally consists of all "legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(a)(1) of the Code. Section 541(c)(2) of the Code, however, provides that restrictions on the transfer of the debtor's beneficial interest in a trust which is enforceable under applicable nonbankruptcy law is enforceable in bankruptcy cases. The Supreme Court has held that this provision covers pension plans qualified under the Employee Retirement Income Security Act ("ERISA"), which was determined to be "applicable nonbankruptcy law." *Patterson v. Shumate*, 504 U.S. 753 (1992). Consequently, if the Debtor's interest in either plan is protected by ERISA, the protected plan is not property of the estate.

Mr. Woodyear's interest in both PPG plans is clearly covered by ERISA. To what extent, however, is the Debtor's interest protected by ERISA, and therefore excluded from the estate?

Presently, both the Savings Plan and the Retirement Plan are in the name of Mark Woodyear. While the state court has recognized the Debtor's one-half interest in the plans, until a qualified domestic relations order ("QDRO") is issued, her interest is not recognized by

PPG. Although no QDRO has been issued, this court believes that the QDRO is merely the procedural mechanism which must be used to enforce the Debtor's interest which has already been established by the state court prior to the filing of this case. There can be no doubt that a QDRO will be issued since the Debtor's interest cannot be recognized otherwise. For that reason, the court believes that the proper analysis is to examine the status of the Debtor's interest in each plan as if the QDRO was issued prior to the filing of the case. As the two PPG plans are not identical in nature, each must be examined separately.

Savings Plan. When a QDRO is issued, the alternate payee or non-employee spouse receives an *immediate* distribution of the interest. The alternate payee *cannot* set up an account in the Savings Plan. See p. 12, Benefits Booklet. Thus, once the QDRO is issued, the Debtor will receive a distribution of her interest. Her interest will no longer exist in a trust or plan. ERISA will therefore no longer apply. As ERISA no longer applies to those funds, the Debtor's interest in the Savings Plan is included as property of the estate.

Retirement Plan. When a QDRO is issued, the plan administrator may be required to "commence payment to an alternate payee on or after the employee's early retirement date, whether or not the employee retires." See p. 3, Summary of the Retirement Plan. The alternate payee may begin receiving payments under the Retirement Plan, but not until the employee spouse first becomes eligible to receive payments. Until that time, however, the alternate payee's interest remains in the Retirement Plan. Under ERISA, an alternate payee has standing to enforce

the provisions of ERISA. 29 USCA §1056(d)(3)(J); *Stephen Allen Lynn, P.C. Employee Profit Sharing Plan and Trust, et al., v. Stephen Allen Lynn, P.C. et al.*, 25 F.3d 280 (5th Cir. 1994). Thus, ERISA continues to protect the Debtor's interest in the Retirement Plan, and her interest in the Retirement Plan continues to be subject to the same anti-alienation provisions which apply to Mr. Woodyear's interest. The Debtor's interest in the Retirement Plan, therefore, is excluded from property of the estate pursuant to section 541(c)(2) and *Patterson v. Shumate, supra.*

(b) Exemption.

Since the Debtor's interest in the Savings Plan is property of the estate, is that interest exempt? Pursuant to section 522(b)(1) of the Code, states may reject the federal bankruptcy exemption scheme and restrict their domiciliaries to those exemptions recognized under state law and federal nonbankruptcy law. Louisiana has "opted out" of the bankruptcy exemptions [LSA-R.S. 13:3881(B)(1)] and thus, reference must be made to those exemptions allowed under Louisiana law.

LSA-R.S. 20:33 provides as follows:

> The following shall be exempt from all liability for any debt except alimony and child support:
>
> (1) All pensions, all proceeds of and payments under annuity policies or plans, all individual retirement accounts, all Keogh plans, all simplified employee pension plans, and all other plans qualified under Sections 401 or 408

> of the Internal Revenue Code. However, an individual retirement account, Keogh plan, simplified employee pension plan, or other qualified plan is only exempt to the extent that contributions thereto were exempt from federal income taxation at the time of contribution, plus interest or dividends that have accrued thereon. No contribution shall be exempt if made less that one calendar year from the date of filing for bankruptcy, whether voluntary or involuntarily, or less than one calendar year from the date writs of seizure are filed against such account or plan.
>
> (2) All gratuitous payments made by employers to their employees or former employees, or to the widow, or heirs, or beneficiaries of their employees or former employees, whether such payments are made in consideration of the length of service rendered by the employee, his age, death, or otherwise.

The key issue thus becomes whether the Debtor's interest in the Savings Plan is tax exempt. As discussed above, once the QDRO is issued, the Debtor's interest in the Savings Plan will no longer exist in a pension plan, account or trust. Therefore, her interest in the Savings Plan is not exempt under LSA-R.S. 20:33.

III. CONCLUSION

The interest of the debtor in the Savings Plan is property of the estate and is not exempt. The objections of the Trustee and of Clarke as to the Savings Plan are **SUSTAINED**.

The interest of the debtor in the Retirement Plan is not property of the estate. The objections of the Trustee and of Clarke as to the Retirement Plan are **OVERRULED**.

A separate order in conformity with the foregoing reasons is this day being entered into the record of this proceeding.

THUS DONE AND SIGNED in Chambers at Opelousas, Louisiana, on this 19th day of November, 1996.

/s/ Gerald H. Schiff
Gerald H. Schiff
United States Bankruptcy Judge

APPENDIX G

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

IN RE:

MARILYN WOODYEAR, **CASE NO. 96-20468-13**

Debtor

ORDER

(Filed Nov. 19, 1996)

This matter is before the court pursuant to the objections to the Debtor's claim of exemption filed by Keith A. Rodriguez, the standing chapter 13 trustee, and Clarke Insurance, Inc. A hearing on the objections to the exemption was held on October 17, 1996, after which the matter was taken under advisement. Now, for the written reasons this day filed in to the record of this proceeding,

IT IS ORDERED that, pursuant to the provisions of 11 U.S.C. § 541(c)(2), the Debtor's interest in the PPG Industries Retirement Income Plan is not property of the estate, and, accordingly, the objection to the exemption is **DENIED**; and

IT IS FURTHER ORDERED that the Debtor's interest in the PPG Industries Employee Savings Plan is property of the estate, and, further, that the claim of exemption of such property is not well-founded, and, accordingly, the objection to the exemption is **SUSTAINED.**

THUS DONE AND SIGNED in Chambers at Opelousas, Louisiana, on this 19th day of November, 1996.

/s/ Gerald H. Schiff
Gerald H. Schiff
United States Bankruptcy Judge